SAW SWAN KEE

v.

SIM LIM FINANCE (M) BHD.

FEDERAL COURT, KUALA LUMPUR
GEORGE SEAH FJ
MOHD. AZMI FJ
SYED AGIL BARAKBAH FJ
[CIVIL APPEAL NO. 85 OF 1984]
30 NOVEMBER 1984

CIVIL PROCEDURE: *Garnishee proceedings - Ex parte order nisi obtained - Discharged by Court - Debt due to garnishee from judgment debtor - Whether actionable debt - Whether capable of being set off against debt attached by garnishment.*

The garnishor (the appellant/judgment creditor) obtained judgment against a housing developer (the judgment debtor) in the sum of RM18,700. The sum represented progress payments made by the garnishor to the judgment debtor under a sale and purchase agreement of a shophouse. The agreement provided for the refund of payments made upon the garnishor giving up her rights to complete the purchase. The agreement also empowered the judgment debtor to resell the property to third parties. The judgment debtor contracted to sell the property at a price of RM35,000; of this sum RM25,000 was raised by way of a loan obtained from the garnishee, Sim Lim Finance (M) Berhad (the respondent), by the judgment debtor against the security of a first legal charge of the property. The garnishor sought to garnish this sum in the hands of the garnishee to satisfy the judgment. The High Court refused to allow a garnishment order *nisi* to be made absolute against the garnishee. The garnishor appealed.

Held:

[1] There was no actionable debt due from the judgment debtor to the garnishee as at the date of the garnishment order *nisi*.

[2] It was not open to the garnishee/chargee to convert a secured loan expressed to expire at a future date into an actionable debt so as to facilitate a garnishment of the monies in its hands.

[3] As under the loan arrangement between the garnishee/chargee and the judgment debtor the balance of the whole loan would not become payable and due until November 1985, and unless a demand for repayment is made before that date there was no actionable debt due from the debtors to the garnishee/chargee as at the date of the order *nisi*.

[4] The authorisation by the judgment debtor to deduct the outstanding loan installments and interest due cannot in the circumstances convert the secured loan into an actionable debt.

[5] As there was no actionable debt due from the judgment debtor to the garnishee/chargee as at the date of the garnishment order *nisi*, the garnishee/chargee was not entitled to set off the sum of RM25,000 against the debts attached by the garnishor.

[Appeal allowed with costs. Order discharging garnishment order nisi set aside. The order nisi be made absolute.]

Cases referred to:
Pyne v. Kinna II Ir Rep CL 40

Legislation referred to:
Rules of the High Court 1980, O.49 r.1
Common Law Procedure Act (UK), s. 63
National Land Code 1965, ss. 253, 254 (3) (a)

Other source referred to:
Supreme Court Practice [1979] White Book, p. 778

For the appellant - V. Balendran; M/s Balendran Chong & Bodi
For the respondent - Andrew T.S. Goh; M/s Andrew T.S. Goh & Co.

JUDGMENT

Mohd. Azmi FJ:

This is an appeal against the decision of the High Court in refusing to allow a Garnishment Order *nisi* to be made absolute against the garnishee, the respondent herein. The Order *nisi* was obtained *ex parte* on 11 January 1983 and was discharged by the Court on 21 February 1984.

The facts leading to the garnishment proceedings are not seriously in dispute. On 20 December 1982, the garnishor (appellant/judgment creditor) obtained a judgment by default in the sum of RM18,700 against a housing developer - Syarikat Seri Belian Sdn. Bhd. (judgment debtor) *vide* Kuantan High Court Civil Suit No. 289/1982. The sum adjudged was in respect of progress payments made towards the purchase of a shophouse held under title H.S.(D) No. 885 in Pulau Sebang, Malacca, which the judgment debtor had agreed to refund when the garnishor gave up her rights to complete the sale and purchase agreement. This arrangement enabled the judgment debtor to resell the property at an increased price of RM35,000 to Tay Bin Lam and Chong Yin Thye (hereinafter referred to as "third parties") and thereby made an extra profit of RM15,000 on this particular property. In settling the purchase price, the third parties paid RM10,000 to the judgment debtor and the balance of RM25,000 was raised by way of a loan obtained from the garnishee under a financial arrangement between the judgment debtor and the garnishee on the security of a first legal charge of the property. It was this sum of RM25,000 in the hands of the garnishee that the garnishor sought to attach by way of garnishment under O. 49 r. 1 RHC, 1980, to satisfy the judgment obtained against the judgment debtor which inclusive of accrued interest and expenses had then come to RM19,744.74.

In discharging the garnishment order nisi, the learned Judge principally relied on two letters (Ex. B and C) which purported to support the garnishee's contention that when the *ex parte* order was made on 11 January 1983, there was in existence a debt due and owing to it from the judgment debtor and as such it was entitled to set-off against the debt attached by the garnishor the debt owing to it which at all material times was alleged to be more than RM25,000. On the law of right of set-off by a garnishee, the learned Judge rightly relied on the following passage in the *Supreme Court Practice* 1979 White Book at p. 778:

> Set-off or Counterclaim - A garnishee cannot set-off against the debt attached, a debt owing to him from the judgment creditor (garnishor) (*Sampson v. Seaton Railway* [1875] LR 10 QB 28; but he can avail himself of a set-off against the judgment debtor, which existed when the order nisi was made (*Nathan v. Giles* [1814] 5 *Taunt*. 558; *Sampson v. Seaton Railway, supra; Tapp v. Jones* [1875] LR 10 QB at p. 593).

In *Tapp v. Jones*, Blackburn J said at p. 593:

> It is obviously just that if a cross debt were due to the garnishee at the date of attachment there should be a right of set-off in his favour, and I should strive hard to give effect to it if I could, though there would be difficulties in the way.

Having regard to the clear position of the law on the subject, the only issue which we have to determine is whether when the garnishment order *nisi* was made on 11 January 1983, there existed a debt due to the garnishee from the judgment debtor that could be set-off. To satisfy ourselves that there was indeed a cross debt in existence at the material date, we propose first to examine the two letters relied upon by the learned Judge and indeed by the garnishee, and we think it would be helpful to reproduce them *in extenso*. The first letter (Ex. B) is undated and written by the third parties to the manager of the garnishee. It is in the following terms:

> Dear Sir,
>
> Re: **Mukim of Pulau Sebang, H.S.(D) No. 885**
>
> We refer to the above matter.
>
> We have purchased the property from Syarikat Seri Belian Sdn. Bhd., and have taken a loan of RM25,000 from your finance company to pay the balance of the purchase price due to Syarikat Seri Belian Sdn. Bhd. We understand that the above property is presently charged to your company by the Vendor and that your company has refused to discharge the property upon payment of RM5,000 by Syarikat Seri Belian Sdn. Bhd. By reason thereof the transfer of the above property in our favour cannot be effected. We also understand that the reluctance on the part of your company to discharge the above property is because the Vendor is not able to complete the housing scheme and have the Certificate of Fitness for Occupation issued by the relevant authority.
>
> We hereby agree that if your company should discharge the above property we shall irrevocably authorise you to release the sum of RM25,000 to Syarikat Seri Belian Sdn. Bhd. notwithstanding the Certificate of Fitness for Occupation in respect of the above property has not been issued by the relevant authority. We also understand that Syarikat Seri Belian Sdn. Bhd. is willing to allow you to retain the said sum of RM25,000 towards payment of the loan due to you from them.
>
> Your kind and sympathetic consideration in this matter will be much appreciated.
>
> Thank you.
>
> Yours faithfully,
> Sgd.
>
> Tay Bin Lam and
> Choong Yin Thye
>
> c.c.
>
> 1. Syarikat Seri Belian Sdn. Bhd.
> 2. M/s. Andrew T.S. Goh & Co."

The other letter (Ex. C) dated 10 March 1982 is from the judgment debtor to the manager of garnishee authorising the garnishee to utilize the sum of RM25,000 due to the judgment debtor from the third parties towards its outstanding loan account with the garnishee. It is worded as follows:

Dear Sir,

Re: **Taman Rakyat, Lot 2172 Kuala Ina, Pulau Sebang,**

H.S.(D) 885, Lot 5/2172

We refer to the above and a copy of the undated letter from the purchaser Mdm. See Kio @ Choong Yin Thye and Mr. Tay Bin Lam whom had request you to release the housing loan of RM25,000 which had been granted to them by you.

We hereby authorise you to deduct whatever outstanding loan interests and installments due to you by us from the release of the above housing loan.

Thank you.

Yours faithfully,
Sgd?

Syarikat Seri Belian Sdn. Bhd.

c.c.

M/s. Andrew T.S. Goh & Co.,
Advocates & Solicitors,
No.96, (1st floor),
Jalan Hang Jebat,
Melaka.

It should be observed that these two letters were written at the instance of the garnishee as subsequent condition to the granting of the loan of RM25,000 to the third parties and the transfer of the shophouse to them. This is confirmed by para. 12 and 13 of the affidavit of Mr. Lee Kim Boon, the manager of garnishee company, Malacca Branch, sworn on 2 February 1983. This in effect is an attempt by the garnishee to transform a secured loan by a chargor into an actionable debt where the whole loan is not yet due and payable to the chargee. It should be observed that the garnishee is the overall financier of the judgment debtor's housing project and whatever loans given to the judgment debtor have been adequately secured by the charge created over the property under development in favour of the garnishee. In our view the effect of Exhibit B is quite clear. This document read with Mr.Lee's first affidavit (pp. 16 to 23 of records) shows that when the loan of RM25,000 was approved, it was for the purpose of paying it to the judgment debtor as vendor of the shophouse. Exhibit B is an authorization given by the borrowers (the third parties) to the garnishee/ lender to release the loan of RM25,000 to the judgment debtor to settle the balance of the purchase price of the shophouse notwithstanding that certificate of fitness had not been obtained in respect of the building. Although the letter is undated, it can be inferred from the second letter, Exhibit C, and this is not disputed by the parties, that it must have been written a few days prior to 10 March 1982. In short, when the Garnishment Order *nisi* was obtained in January 1983, there was a sum of RM25,000 belonging to the judgment debtor in the hands of the garnishee. As admitted in para. 14 of Mr. Lee's first affidavit, this sum has not until today been released by the garnishee to anyone. Now, what is the legal effect of the second letter, Exhibit C? On the proper construction of this document, can the authorization in that letter create a cross debt due from the judgment debtor to the garnishee so as to entitle the garnishee to a set-off? We do not think so particularly having regard to the overall financial arrangement and relationship between the garnishee and the judgment debtor. It is common ground that the judgment debtor was the registered owner of a piece

of land known as Lot. 2172 in Malacca under Grant No. 2673. When the judgment debtor decided to convert and develop the said land into a housing estate, the garnishee granted a bridging loan of RM300,000 which was referred to in para. 3 of Mr. Lee's affidavit as Case No.1979, and another loan of RM150,000 (referred to as Case No. 2315) against a first legal charge of the said land and another piece of land known as Lot No. 2173 also owned by the judgment debtor in Malacca held under Grant No. 2674. The bridging loan of RM150,000 has been fully settled by the judgment debtor. In respect of the other bridging loan, it is contended by Counsel for the garnishee that the whole sum of RM300,000 should have been settled by 6 August 1981 and that at 21 March 1983 there was still a sum of RM45,677.83 due to the garnishee inclusive of interest (see Ex D annexed to Mr. Lee's affidavit dated 25 March 1983 at pp. 42 and 103 of appeal record). However, from Exhibit D it is obvious to us that the financial arrangement between the garnishee and the judgment debtor in the housing project consisted of various loans including the three secured loans mentioned in the Exhibit *viz*: loan case No. 1979 for RM300,000; loan case No. 3750 for RM200,000 and loan case No. 3829 for RM100,000 and the total balance of loan outstanding as at 21 March 1983 was RM141,917.10. In our view as between the garnishee and the judgment debtor the whole three loans must be considered together in the context of the financing of the housing project and this total balance of loan will only expire on 20 November 1985. As such the balance of the whole loan would not become payable and due as an actionable debt until November 1985 unless a demand for repayment is made before that date. Even if it were successfully argued that the loan case No.1979 for RM300,000 is a separate and distinct loan, the fact that the date of its expiry was 6 August 1981 did not in our view make the balance of RM37,000 due and payable as a debt, since the garnishee continued to charge interest till 2 February 1983 i.e. well after the date the decree *nisi* was made. We are unable to find any credible evidence to show that on the relevant date (11 January 1983) any actionable debt was in existence and payable to the garnishee from the judgment debtor. As a financier of the judgment debtor's housing project in Malacca, the garnishee kept a running account with the judgment debtor under various secured loans. From para. 3,4 and 5 of Mr. Lee's first affidavit dated 2 February 1983, the garnishee's financial arrangement with the judgment debtor is as follows:

> 3. Initially the judgment Debtor was granted a bridging loan of RM300,000 (Mortgage Loan Case No. 1979) and RM150,000.00 (Mortgage Loan Case No. 2315) against a first and second legal charge of Lot Nos. 2172 and 2173 both in the Mukim of Pulau Sebang, Malacca held under Geran Nos. 2673 and 2674 respectively.
>
> 4. Subsequently Lot No. 2172 was subdivided into the 108 lots mentioned in para. 2 above and the Garnishee agreed to grant end-financing to qualified purchasers of the said housing scheme up to RM1,200,000 upon the terms and conditions mentioned in the Garnishee's letter dated 7 March 1980 to the Judgment Debtor.
>
> 5. As the houses were being built most of the 108 titles were gradually discharged by the Garnishee on payment of the redemption sum in order for the Judgment Debtor to transfer individual titles to each of the purchaser who in turn would charge back the property bought by the purchaser to the Garnishee to secure the loan granted by the Garnishee to the purchaser to help him purchase the property from the Judgment Debtor."

Paragraph 9 of the said affidavit further states that at present (which must be 2 February 1983 - the date the affidavit was sworn) there are still 24 out of the 108 titles not discharged and whereas the amount of loan balance owing by the judgment debtor to the garnishee in respect of this 108-unit project is only RM44,483.51 comprising of RM37,000 as principal and RM7,483.51 as interest, and this amount is sufficiently secured by two pieces of land-Lot

2173 and the remaining 24 sub-divided lots from Lot 2172. In other words, as between the garnishee and the judgment debtor not only is the balance of loan amply secured by the legal charges, but the garnishee has neither issued any demand for the repayment of the balance nor took any step after expiry of date of repayment to enforce its right provided under the legal charge (see p. 50 of appeal record). It should be noted that a debt is a sum payable in respect of a liquidated money demand recoverable by action (see *Rawley v. Rawley* 1 QBD 460). In that case the action was brought for money lent and the defendant pleaded a set-off of a promissory note created when the plaintiff was an infant but not properly ratified in writing after he came of age. Cockburn CJ in dealing with the Statute of Set-off held that, "the right of set-off depends I think upon there being an actionable debt. The statute, no doubt, speaks of 'debt', but that, unless a very narrow construction be adopted, means actionable debt." On appeal to the Court of Appeal, in unanimously affirming the decision of the Divisional Court, Mellish LJ also held that, "no debts can be used by way of set-off except such as are recoverable by action". In *Pyne v. Kinna* 11 Ir Rep CL 40 it was held that a promissory note not yet due did not constitute a debt within the meaning of s. 63 of the Common Law Procedure Act 1856 which could be attached to answer a judgment debt. Similarly, it is our view that a loan secured by a legal charge is not a legal debt due to the lender/chargee until the loan has become payable in respect of a liquidated money demand recoverable by foreclosure action under ss. 253 and 254 of the National Land Code. The effect of s. 254(3)(a) is that the whole sum secured by the charge shall only become due and payable to the chargee if at the expiry of the period specified in the notice, the breach by the chargor has not been remedied. Under Clause 1 of the charge document, it is implicit that the judgment debtor as a chargor will only pay the garnishee "on demand" and "until demanded as agreed" it has to repay the loan within two years. Although the two-year period had expired, no step was taken for foreclosure. Instead, further loans have been granted on new charges which merely lend support to the garnishor's contention that the financial arrangement between the garnishee and the judgment debtor is a continuing loan on a running account basis and until there is finalized account between them in respect of their relationship as chargee and chargor and also their relationship as a financier and housing developer respectively, no legal debt has come into existence which is owing and payable at the time when the decree *nisi* was obtained. As such the amount owing to the garnishee under the various secured loans is incapable of being used as a set-off by the garnishee as on 11 January 1983. Indeed, in his written submission before the learned trial Judge at p. 115 of appeal record, Counsel for the garnishee admitted that the sum of RM45,677.83 was due to the garnishee from the judgment debtor as on 21 March 1983 which is subsequent to the date when the order *nisi* was made. There is therefore no evidence of a debt if any being due and payable to the garnishee from the judgment debtor as on 11 January 1983. Exhibit B merely authorised the garnishee to deduct the RM25,000 from the outstanding loan interest and instalment due to the garnishee. Such authorisation at the insistence of the chargee cannot in our view create an actionable debt due from the judgment debtor to the chargee/garnishee under the legal charge for the simple reason that the balance of secured loan does not become due and payable until the chargee/garnishee has taken some positive step to crystallize the debt. As there was at the material time no debt due and payable to the garnishee from the judgment debtor, the authorisation to pay by the judgment debtor does not have any effect, and the loan of RM25,000 taken by the third parties from the granishee would remain the property of the judgment debtor as vendor of the shophouse. In the circumstances of this case there was no debt due and payable to the garnishee at the relevant date, capable of being set-off against the debt attached by the garnishor. The same applies to the other balance of outstanding loans.

We therefore hold that while the learned Judge was correct in stating the law on the right of set-off by a garnishee, he fell into error in treating the balance of the secured loans as an actionable debt without considering the date of expiry of the various loans, or whether the date of expiry has been waived by the imposition of interest after such expiry, and whether a demand for repayment has been made under the provisions of the National Land Code. In the result he has misconstrued the affidavit of Mr. Lee by holding that there was a debt of more than RM25,000 due and payable by the judgment debtor to the garnishee when the order *nisi* was made. As observed earlier, neither the affidavit of Mr. Lee nor the written submission of Counsel for the garnishee made before the trial Judge support this finding. The amount stated to be due is in reality a balance of secured loan and not an actionable debt existing as on 11 January 1983. In any event, the balance of loan stated to be due was only ascertained subsequent to the date of order *nisi*. The letter of the judgment debtor (Ex. C) dated 10 March 1982 which authorised the garnishee "to deduct whatever outstanding loan interests and installments due to you by us" cannot in our view change or convert the outstanding secured loan into a legal debt; nor transform the loan of RM25,000 given by the garnishee to the third parties and authorised to be released to the judgment debtor into an actionable debt that can be set-off by the garnishor. In the absence of actionable debt, the sum of RM25,000 cannot constitute a cross debt due to the garnishee from the judgment debtor at the relevant date of the decree *nisi*.

We would therefore allow this appeal with costs both here and in the High Court. The order discharging the garnishment order *nisi* is set aside. Under O. 49 r. 1, Rules of the High Court 1980, we order that the Order *nisi* be made absolute. The deposit in this appeal should be refunded to the appellant.

Also found at [1985] 2 CLJ 356